



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

August 16, 1985

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ARIZONA ATTORNEY GENERAL**

Mr. Thomas Thode
539 Fourth Avenue
Yuma, Arizona 85364

Re: I85-099 (R85-103)

Dear Mr. Thode:

You have asked two questions concerning whether the Yuma City Council (Council) can reprimand certain city employees and the means employed to implement the reprimand. The reprimand is presently in the form of an initiative petition, the pertinent provision of which provides:

Be it enacted that the City Clerk, City Administrator and City Attorney of the City of Yuma be reprimanded in writing for their neglect of duty in failing to provide legal and proper petitions for Referendum to Ordinance 2242 passed by the City Council at its meeting of December 19, 1984, and such reprimand shall be made a permanent part of their personnel file.

Specifically, you ask, first, whether the Council has authority to adopt the initiative petition as a resolution of reprimand, and second, if not, because such action is prohibited by city charter or constitutionally prohibited, must it place the initiative on the ballot for a vote by the people.

City councils are vested only with those powers conferred by city charter. City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); Williams v. Parrack, 83 Ariz. 227, 319 P.2d 989 (1957). The Yuma City Charter,

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Article VII, § II, confers limited authority to the city council over city employees, which is consistent with council-manager form of government adopted by the City of Yuma through its charter.

. . . the Council or its members shall deal with city officers and employees who are subject to the direction and supervision of the City Administrator, solely through the City Administrator, and neither the Council nor its members shall give any orders to any such officer or employees, either publicly or privately.

The city charter also provides, pursuant to Article VII, § 9, that the Council has no power to dictate the appointment or removal of any city administrative officer or employee. Furthermore, the city administrator is responsible for the direction and supervision of all departments, offices, and agencies of the city under Article VIII, § 4.

Therefore, the Council cannot interfere with the city administrator's supervision of city officers. Since the city attorney and city clerk are appointed by the city administrator and are under his supervision, the Council has no legal authority to reprimand them.

Moreover, when a legislative body through a legislative act, no matter what form that act may take, attempts to punish a specifically designated person or group without benefit of a judicial trial, the legislative act is referred to as a "bill of attainder." United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707 (1965); United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 (1867); State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981). Consistent with the doctrine of separation of powers and a recognition that the legislative branch of government is ill equipped to be an independent judge and jury in determining a specific persons liability and punishment, both federal and state constitutions prohibit bills of attainder. Article 2, § 25 of the Arizona Constitution states that "No bill of attainder . . . shall ever be enacted." The Bill of Attainder clause of the United States Constitution (Art. I, § 9, cl. 3 and Art. I, § 10, cl. 1) was intended to be a "general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature." United States v. Brown.

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In Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777 (1977), the United States Supreme Court articulated a two-part test for determining whether a legislative enactment is a bill of attainder. If the act impermissibly designates an individual or an easily identifiable group and then proceeds to punish that person or group, it is a bill of attainder. While punishment under the bill of attainder clause historically meant death, imprisonment, banishment, or confiscation of property, the court in Nixon applied a functional test to encompass new burdens and deprivations that are inconsistent with the bill of attainder clause. The court analyzed whether the enactment reasonably could be said to further nonpunitive legislative purposes and, in the absence of such purpose, it is reasonable to conclude that punishment was the purpose of the decision-makers.

The Yuma City Council possesses legislative powers. Any legislation (resolution) it enacts must be consistent with the Constitution and laws of the State. Article VII, § 1, Yuma City Charter.

The initiative petition finds the named officers guilty of neglect of duty without a judicial determination and imposes the punishment of a written reprimand. The initiative measure fits the definition of a bill of attainder. Although the punishment involved here is minor (written reprimand), it is within the definition of punishment, for bill of attainder purposes. The intent and purpose of the initiative is to punish the city clerk, city attorney, and city administrator for perceived wrongdoings. A legitimate, nonpunitive legislative purpose is not apparent from the language of the initiative. If the Council were to adopt the initiative measure, it would be enacting an unconstitutional bill of attainder.

Even if the reprimand initiative is construed as prohibited by city charter and unconstitutional, you ask whether it should be placed on the ballot. The Yuma City Charter, Article V, § 1(b) provides as follows:

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The City Council shall, upon receipt of notification from the City Clerk that valid petitions for initiative have been filed, either adopt the initiative measure within fifty days of the presentation by the City Clerk or set a date for a special election no later than one hundred twenty days from the date of presentation by the City Clerk.

In Williams v. Parrack, 83 Ariz. 227, 319 P.2d 989 (1957), a similar city charter initiative provision was interpreted. In that case, the City of Phoenix refused to submit an initiative petition to the voters, arguing that the matters were not subject to initiative. The Arizona Supreme Court ordered submission of the proposal to the voters and stated:

. . . we are not now concerned in the instant case with the power of the city council to enact the ordinance in question under the provisions of its Charter, or whether such an ordinance, if enacted, would be legal or illegal. We are concerned here only with whether the city council has the power to decline to act upon a petition . . . We find nothing in Chapter XV that vests the city council with power other than to pass the ordinance unaltered or to call a special election and submit it to the qualified voters of the city. This is true regardless of what it may believe to be, or has been advised to be, the legal status of such ordinance when enacted. It is clear to us that under the language of the Charter the duty of the council under such circumstances is purely ministerial and mandatory.

Williams v. Parrack, 83 Ariz. at 230, 319 P.2d at 991 (Emphasis added).

When the petition is sufficient in form and bears the number of legal signatures required, nothing further is required for placement of the proposed measure on the ballot. Iman v. Bolin, 98 Ariz. 358, 404 P.2d 705 (1965). Even if the measure is in conflict with the Constitution, this has no bearing on the right of the people to enact it. Only after legislation becomes law may its constitutionality be tested.

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Queen Creek Land & C. Corp. v. Yavapai Cty. Bd. of Sup., 108
Ariz. 449, 501 P.2d 391 (1972); Iman v. Bolin, 98 Ariz 358, 404
P.2d 705 (1965); State v. Osborn, 16 Ariz 247, 143 P. 117
(1914). If the Yuma initiative petition is sufficient in form
and number of signatures, the city council must place it on the
ballot.

Sincerely,



BOB CORBIN
Attorney General

BC:JBS:JCD:mch